

## The Impossible Dream: Real International Antitrust

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# The Impossible Dream: Real International Antitrust

Diane P. Wood†

The apparent triumph of free market ideology around the world that has followed the collapse of the Soviet empire coincides with a period of intense strain in international trading relations. The countries of Central and East Europe and the new republics that have replaced the Soviet Union are attempting to put in place the basic laws that will assure a healthy market economy,<sup>1</sup> and many developing countries have taken significant steps in that direction. However, at the same time, the efforts of the member nations of the General Agreement on Tariffs and Trade ("GATT") to assure a system of international trade under which goods and services are produced efficiently, prices are accurate and transparent, and governmental distortions are minimized, have been foundering.<sup>2</sup>

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<sup>1</sup> The laws in question establish (or re-invigorate) the enforceability of contracts, the banking system, taxation, terms of foreign investment, and a host of other subjects. See generally Monte E. Wetzler, Chairman, *Joint Ventures and Privatization in Eastern Europe* (Practicing Law Institute, 1991); David E. Birenbaum and Dimitri P. Racklin, *Business Ventures in Eastern Europe and the Soviet Union: the Emerging Legal Framework for Foreign Investment* (Prentice Hall Law & Business, 1990); and Eugene Theroux, chairman, *Legal Aspects of Trade and Investment in the Soviet Union and Eastern Europe 1990* (Practicing Law Institute, 1990). These particular changes in business law are taking place against a background of more profound constitutional change. See, for example, *Constitution Watch*, 1 East European Constitutional Rev 2 (1992).

<sup>2</sup> The General Agreement on Tariffs and Trade, 55 UNTS 194, as amended, is the basic charter for international trade. See generally John H. Jackson, *World Trade and the Law of GATT* (Bobbs-Merrill, 1969); Kenneth Dam, *The GATT: Law and International Economic Organization* (U of Chicago Press, 1970). The current version of the General Agreement can be found at GATT, 4 *Basic Instruments and Selected Documents* ("BISD"). The most recent efforts toward the liberalization of the GATT rules, known as the Uruguay Round, were launched in a Ministerial Declaration of the Contracting Parties following a meeting in Punta del Este, Uruguay, in September 1986. See General Agreement on Tariffs and Trade: Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations, 25 ILM 1623 (1986). The Uruguay Round was originally scheduled to be completed in December 1990. When it became clear that disagreements over such diverse subjects as trade in agri-

The same dynamics have led to another apparent paradox. On the one hand, countries around the globe have enacted antitrust laws (also called competition laws or antimonopoly laws) both to symbolize their commitment to the competitive process and to prevent the abusive practices which may tempt powerful firms.<sup>3</sup> On the other hand, efforts to obtain an international consensus on competition law principles have thus far met with only the most modest success, to the point that the search for either harmonization of national competition law rules or the establishment of any kind of supranational procedural or substantive regime seems to be an impossible dream.<sup>4</sup>

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cultural products, the rules for government subsidies, liberalization of trade in services, and trade-related intellectual property rules could not be resolved, the negotiating parties decided to extend that deadline. See, generally, John H. Jackson, *Restructuring the GATT System* (Council on Foreign Relations Press, 1990); Judith H. Bello and Alan F. Holmer, *The Uruguay Round: Where Are We?* 25 *Intl Law* 723, 724-26 (1991). The critical point about the Uruguay Round for present purposes is the fact that its aspirations were all based on well understood principles of open, free market competition; its difficulties have stemmed from a reluctance on the part of all GATT member countries to embrace those principles in an unqualified manner.

<sup>3</sup> See, for example, Brazilian Basic Legislation on Competition, including Law No 8002 of 14 March 1990, making provision for the repression of attempted infringements on consumers' rights and Law No 8158 of 8 January 1991, setting rules to protect competition and making other provisions (on file with the *Legal Forum*); Republic of Korea, Monopoly Regulation and Fair Trade Act, Law No 3320 as amended (on file with the *Legal Forum*); Taiwanese Fair Trade Law of February 4, 1991 (on file with the *Legal Forum*); Czechoslovakia, Act on Protection of Economic Competition (Jan 30, 1991) translated in V. Pechota, ed, 1 *Central & East European Legal Materials* (rel no 4); Poland, Law on Counteracting Monopolistic Practices (Feb 24, 1990) translated in Pechota, 2 *Central and East European Legal Materials* (rel no 5). For a treatise including text and commentary on many competition laws, see Julian O. von Kalinowski, ed, *World Law of Competition* (Matthew Bender, 1987).

<sup>4</sup> I am not the first to recall Cervantes's Don Quixote in this context. See Joel Davidow, *The Seeking of a World Competition Code: Quixotic Quest*, in Oscar Schachter and Robert Hellawell, eds, *Competition in International Business* 361 (Columbia U Press, 1981). As the allusion implies, the vision of a world with a unified competition law, like the world where chivalry would have reigned supreme, suggests something highly desirable, but ultimately unattainable. Proponents of "managed trade" or, more generally, conscious industrial policy, would disagree with this premise. For arguments on the need for reciprocal bilateral free trade, rather than the unconditional GATT version, see Douglas F. Lamont, *Forcing Our Hand: America's Trade Wars in the 1980s* 227 (Lexington Books, 1986). For a persuasive argument that American industrial policy should be more self-conscious and above-board, see Robert B. Reich, *The Next American Frontier* (Times Books, 1983).

In the following exploration of the reasons why a true international antitrust regime seems impossible, the circumstances in which each nation chooses to limit its competition laws will be explored in greater detail. To the extent that these reasons can and should vary from place to place, they may suggest that the goal of international competition law is itself problematic, as I have noted elsewhere. Nonetheless, the discussion here proceeds from the basic premise that effective competition offers the best hope for maximum consumer welfare, and that the observed limitations upon competition are explainable in large part as a

It is perhaps easy to understand why the necessary consensus for an international competition law has not coalesced among nations with substantially different economic conditions. The problems of the developing countries, for instance, continue to place strains on their economic policies that have no counterpart in the so-called western industrialized world.<sup>5</sup> Until the overthrow of the Communist regimes, it was difficult to imagine how those countries could ever participate in any serious internationally competitive regime.<sup>6</sup> Even the Asian countries had long-standing traditions governing business relationships that were alien to the world of Adam Smith: witness how poorly the Antimonopoly Law that General MacArthur bequeathed to Japan took root there, at least for the first four decades of its existence.<sup>7</sup>

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necessary evil in a world still significantly divided along nation-state lines. For a general discussion of the problem of monopoly in international trade, see Richard E. Caves and Ronald W. Jones, *World Trade and Payments* 162-78 (Little, Brown & Co., 4th ed 1985).

<sup>5</sup> For example, the role of foreign direct investment, the degree of supervision deemed necessary in that area, the most effective way to address problems of income distribution within the countries, the role government can or should play in developing infrastructure, and optimal taxation policy all pose different questions for the developing countries. Many of these concerns underlie the efforts of the United Nations Commission on Transnational Corporations ("UNCTC") to develop a Code of Conduct for Transnational Corporations, since multinationals are the principal source of foreign direct investment. See UNCTC Current Studies, *The United Nations Code of Conduct on Transnational Corporations* (1986). Competition law normally assumes that entrepreneurial activity will arise in the absence of cartels or exclusionary behavior, but this assumption itself may be grounded in the Western tradition and thus may not be easily transferrable to other cultures.

<sup>6</sup> It was difficult enough to incorporate them into the GATT, although many Warsaw Pact countries eventually acceded to the General Agreement. See M.M. Kostecki, *East-West Trade and the GATT System* (St. Martin's Press, 1978). The Soviet Union never acceded, although the possibility was discussed during the late 1980s. See, for example, Kevin C. Kennedy, *The Accession of the Soviet Union to GATT*, 21 J World Trade L 23 (1987).

<sup>7</sup> The Japanese Antimonopoly Law is nominally quite similar to its North American and European counterparts. See Law No 54, April 14, 1947, Relating to Prohibition of Private Monopoly and Methods of Preserving Fair Trade (Eibun-Horei-Sha, 1978); Mitsuo Matsushita, *Introduction to Japanese Antimonopoly Law*, (Yukikaku, 1st ed 1990). Over the years, enforcement of the Antimonopoly Law has been minimal. See Matsushita, *Japanese Antimonopoly Law*; Abbott B. Lipsky, Jr., *Current Developments in Japanese Competition Law: Antimonopoly Act Enforcement Guidelines Resulting from the Structural Impediments Initiative*, 60 Antitrust L J 279 (1991). As Lipsky describes, in 1989, the United States and Japan undertook a round of discussions dubbed the "Structural Impediments Initiative," which were designed to explore fundamental reasons behind the persistent trade deficit that the United States was experiencing with Japan. The lack of Japanese competition law enforcement was one topic of discussion. The Joint Report issued after the discussions included a commitment on the part of the Japanese to strengthen their competition law enforcement activities, pursuant to which new enforcement guidelines have been issued and new activities have been undertaken. See *Joint Comments on the Japan Fair Trade Commission Antimonopoly Act Enforcement Guidelines*, 60 Antitrust L J 291, 327 (1991); *Japan: Expanded Role is Expected for Antitrust Enforcement Officials*, 9 Intl

Assuming the apparent futility of global agreement on competition law, one is still left with the question why a closer and more formal convergence between similar countries has not yet occurred. Canada and the United States have both had competition laws since the late nineteenth century;<sup>8</sup> the European Community ("EC") made competition law an essential part of the Treaty of Rome from its outset in 1958.<sup>9</sup> Since the Second World War, nearly all EC Member States have enacted national competition laws.<sup>10</sup> At a broad level of generality, the content of these laws does not differ markedly from their U.S. or Canadian counterparts, although this should not mask the fact that the role of competition in the economic policy of the EC Member States and its relationship to other economic policies often diverge from the American models.

It is worth exploring why and to what extent a more formal international competition regime among this group of economically advanced and philosophically compatible countries might be desirable, and what has prevented one from being developed. The answer to the first question, given the increasing dominance of multinational business activity in every sector of economic life, seems clear: effective regulation of the competitive process must somehow take place at the same level where the business activity itself is pursued, that is, the international level. The answer to the second question is more difficult. To a significant degree, the impediments to greater convergence among the principal western economies have been procedural. Beyond that, the failure to reach an international antitrust code is due to the rather considerable gap that lies between aspiration and reality, or between articulated principle and practical application. Through a combination of administrative discretion and an ability to carve out explicit exceptions to competition laws, nations have, to greater or lesser degrees, subordinated free market principles to other elements of national self-interest. Given these constraints, this Article concludes by outlin-

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Trade Rptr (BNA) 244 (Feb 2, 1992); *Japan: Hills Urges Japan to Step Up Antitrust Enforcement and Increase Maximum Fines*, Intl Trade Daily (BNA) 12 (April 29, 1992).

<sup>8</sup> [Canada] Combines Investigation Act, R S, c 314. See Lloyd G. Reynolds, *The Control of Competition in Canada* (Harvard U Press, 1940). In the U.S., antitrust law at the federal level has existed since 1890. See the Sherman Act, 15 USC §§ 1-7 (1988).

<sup>9</sup> See Treaty Est the Eur Eco Comm, Arts 85-94. The earlier European Coal and Steel Treaty of July 20, 1952, also contained competition law provisions at Arts 65-66.

<sup>10</sup> For a listing and summary of major national competition laws, see Thomas H. Reynolds and Arturo A. Flores, *Foreign Law: Current Sources of Codes and Basic Legislation in Jurisdictions of the World* (AALL Publ Series no 33, Fred B. Rothman & Co., 1991).

ing a few ways in which the dream of an international competition regime might become somewhat less impossible.

## I. EFFORTS TO DEVELOP INTERNATIONAL ANTITRUST LAW

### A. Universal Rules within the U.N. System

#### 1. *The International Trade Organization and the Havana Charter.*

Efforts to develop a set of competition law principles with broad international application began at a time when U.S. anti-trust law itself had just reached the end of its formative years,<sup>11</sup> even before the present United Nations was formed.<sup>12</sup> These initiatives went nowhere, partly for the general reasons that eventually caused the failure of the League of Nations, and partly because many of the major European trading nations simply disagreed with the proposition that cartels were bad.<sup>13</sup>

After the Second World War, however, attitudes toward international economic policy changed. The Bretton Woods Conference led to the formation of the International Monetary Fund and the World Bank.<sup>14</sup> The GATT was born in the first round of multilateral negotiations;<sup>15</sup> and a draft charter for an International Trade

<sup>11</sup> For example, the 1914 Clayton Act, 38 Stat 730, 15 USC §§ 12-27, was still a relatively recent addition to the U.S. antitrust arsenal. The Federal Trade Commission, created in the FTC Act, 38 Stat 717 (1914), 15 USC §§ 41-58 (as amended), was also in its infancy. Furthermore, the severity of the Sherman Act prohibitions was still quite an open question, as was illustrated by the need for the Supreme Court in 1927 to reaffirm the automatic illegality of horizontal price-fixing in *United States v. Trenton Potteries Co.*, 273 US 392 (1927), after the decision in *Standard Oil Co. v. United States*, 221 US 1 (1911), had announced the vague and easily manipulated rule of reason.

<sup>12</sup> For a description of the relatively minor efforts undertaken by the League of Nations, see Corwin D. Edwards, *Control of Cartels and Monopolies: An International Comparison* 227-28 (Oceana Publications, 1967). See also William Oualid, *The Social Effects of International Industrial Agreements*, CECP 94 (1926) (prepared for the World Economic Conference sponsored by the League of Nations), discussed in M. Sornarajah, *Towards an International Antitrust Law*, 22 Indian J of Intl L 1, 6 (1982). Oualid's proposals were rejected by the Industrial Committee of the conference.

<sup>13</sup> Not very many countries had cartel laws during this era, and the onset of the Depression in the 1930s led many to believe that cartels were positively useful. Edwards, *Control of Cartels* at 3-6, 228 n 15 (cited in note 12).

<sup>14</sup> See Articles of Agreement of the International Monetary Fund, 60 Stat 1401, TIAS No 1501, 2 UNTS 39 (1947) (original version), reprinted as amended in Stephen Zamora and Ronald A. Brand, eds, 1 *Basic Documents of International Economic Law* 321 (1990); Articles of Agreement of the International Bank for Reconstruction and Development (The World Bank), TIAS No 1507, 2 UNTS 134, reprinted as amended in Zamora & Brand, 1 *Basic Documents* at 427.

<sup>15</sup> See Jackson, *World Trade and the Law of GATT* (cited in note 2); Clair Wilcox, *A Charter for World Trade* 46-49 (MacMillan, 1949).

Organization ("ITO") was prepared.<sup>16</sup> Then, as now, the world community saw economic reforms as closely linked to broader issues of international harmony. Although it would be an exaggeration to say that competition law itself played a central role, the postwar economic institutions represented the triumph of the viewpoint that the international trading system should be purged of nationalistic distortions and left free to grow according to the theory of comparative advantage.<sup>17</sup>

Those broader aspirations led the drafters of the ITO to include chapters on everything that might conceivably distort the optimal world trading system. The Charter, also known as the Havana Charter, therefore included not only the rules on tariffs and trade (which the General Agreement had already accomplished, and which would have been folded into the broader organization), but also rules on international investment, competition, and dispute resolution, among others.<sup>18</sup> The importance of the competition rules was well recognized at the time. Clair Wilcox, one of the principal architects of the ITO, wrote that:

The effort to expand trade by reducing tariffs and eliminating quotas might well be defeated if no action were taken to prevent the erection of private tariff and quota systems by international cartels. The necessary action might either be taken through international agreement or left to the initiative of individual states. But unilateral action, even when taken by a government as powerful as that of the United States, has its limitations. It cannot protect domestic consumers against the consequences of

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<sup>16</sup> The drafters expected that the GATT would be administered under the ITO. See Wilcox, *A Charter for World Trade* at 199-200 (cited in note 15); William Adams Brown, Jr., *The Provisions of the GATT and Its Relationship to the Charter*, in his *The United States and the Restoration of World Trade* 235 (Brookings Institute, 1950).

<sup>17</sup> This consensus was not reached easily, as Clair Wilcox's account of the development of the International Trade Organization Charter (also known as the Havana Charter) makes clear. See Wilcox, *A Charter for World Trade* (cited in note 15). On the economic case for international trade, see generally Bharat R. Hazari, *International Trade: Theoretical Issues* (NYU Press, 1986). See also Corwin D. Edwards, Theodore J. Kreps, Ben W. Lewis, Fritz Machlup, and Robert P. Terrill, *A Cartel Policy for the United Nations* (Columbia U Press, 1945) (reviewing the cartel problem, discussing the inadequacies of unilateral action with respect to international cartels, and arguing for an international policy against them).

<sup>18</sup> The text of the Havana Charter is reproduced in its entirety in Wilcox, *A Charter for World Trade* at 227-327 (cited in note 15). The Department of State version, *Havana Charter for an International Trade Organization*, Pub 3206, Commercial Policy Series 114, released September 1948, is reprinted in Julius J. Marke and Najeeb Samie, eds, 1 *Anti-Trust and Restrictive Business Practices: International, Regional & National Regulation* § 5 D (Oceana Publications, 1982).

cartel agreements in which domestic producers do not participate. It cannot obtain evidence concerning agreements made and administered abroad, even where domestic producers do participate. And if it does succeed in breaking up a cartel that is sponsored or supported by other governments, it may induce those governments, in one way or another, to retaliate. If action against restrictive business practices in international trade is to be effective, it must be taken by many states in accordance with a common understanding as to policy. If the tariff and quota provisions of the [ITO] *Charter* were not to be evaded, it was therefore important that such an understanding be obtained.<sup>19</sup>

Another contemporary study of the Charter that had been prepared for the purpose of advising the U.S. Congress on the ratification question concluded that international cartel provisions were clearly desirable.<sup>20</sup> The study explained this conclusion in language reminiscent of the justifications for including competition law provisions in the Treaty of Rome:

International cartel agreements, by limiting competition, fixing prices, and curtailing trade, can nullify the effects of reductions in governmental barriers to trade. Under the Charter, each member is required to take all possible steps to assure that enterprises in its jurisdiction do not engage in restrictive business practices affecting international trade which have harmful effects on production or trade and interfere with the realization of any of the objectives of the Charter. A procedure is established under which the ITO may receive complaints, conduct investigations, and make findings. Since many of the countries which finally accepted these provisions have no traditional allegiance to the principle of competition, this section of the Charter represents an important concession to the American point of view.<sup>21</sup>

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<sup>19</sup> Wilcox, *A Charter for World Trade* at 105 (cited in note 15).

<sup>20</sup> Committee for Economic Development, *The International Trade Organization and the Reconstruction of World Trade* 22 (1949).

<sup>21</sup> *Id.* at 23. Commentators on the Treaty of Rome have often stressed the importance of the competition rules in preventing the re-establishment of state-created barriers to trade within the Common Market. See, for example, Christopher Bellamy and Graham D. Child, *Common Market Law of Competition* 14-18 (Sweet & Maxwell, 3d ed 1987); David A. O. Edward and Robert C. Lane, *European Community Law—An Introduction* 23 (But-



In the end, however, Congress rejected the ITO, not the least because of the antitrust objections. This was somewhat awkward, since the Americans were, at the time, the greatest publicists for antitrust on the face of the globe, and it seemed peculiar for them to abandon an instrument that promised international coordination of competition rules. The principal obstacles, however, actually reflected that U.S. position: Congress was not ready to cede any antitrust jurisdiction to the international mechanisms established by the Charter, and furthermore, it found the language on restrictive business practices to be too weak, as compared with the prevailing U.S. standards on these matters.<sup>22</sup> Half a loaf was not, under the circumstances, better than no loaf at all.

## 2. *The Economic and Social Council Code.*

After the Havana Charter failed, the Economic and Social Council ("ECOSOC") of the United Nations undertook a more targeted study of anticompetitive practices.<sup>23</sup> That effort resulted in a new set of draft articles of agreement on restrictive business practices. The draft articles were released for public discussion in 1953.<sup>24</sup> The draft was based in large part on Chapter V of the failed ITO, with most differences due to the fact that the rest of the ITO organization on which Chapter V had depended no longer existed. It included, with one exception relating to technology agreements, the same list of restrictive practices as the Havana Charter had adopted.<sup>25</sup> Institutional machinery, as before, proved problematic. The ECOSOC decided to circulate the Committee's

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terworths, 1991); D.G. Goyder, *EC Competition Law* 72, 358 (Clarendon Press, 1988); Lennart Ritter, Francis Rawlinson, and W. David Braun, *EC Competition Law—A Practitioner's Guide* 10-13 (Kluwer Law and Taxation Publishers, 1991); Sir Leon Brittan, *Competition Law: Its Importance to the European Community and to International Trade* 2-3, Speech at the University of Chicago Law School, April 24, 1992 (text on file with the *Legal Forum*).

<sup>22</sup> William Diebold, Jr., *The End of the ITO* (Essays in International Finance No 16, Princeton U, 1952).

<sup>23</sup> The study was undertaken pursuant to Economic and Social Council resolution 375 (XIII) of 13 Sept 1951, reprinted in Marke & Samie, 1 *Anti-Trust and Restrictive Business Practices* § 5 D 2 at 29 (cited in note 18).

<sup>24</sup> *Report of the Ad Hoc Committee on Restrictive Business Practices to the Economic and Social Council*, E/2380, E/AC.37/3 (Mar 30, 1953), reprinted in Marke & Samie, 1 *Anti-Trust and Restrictive Business Practices* § 5 D 2 at 29 (cited in note 18).

<sup>25</sup> Namely, price-fixing, exclusion of enterprises from markets, market divisions, discriminatory practices, production limitations, preventing the development of technologies by means of agreement, withholding the application of technologies in a way that monopolized a field, extending patent or other industrial property rights beyond their lawful scope, and any other practice added to the list by a two-thirds vote of the organization. *Annex II to the Ad Hoc Committee's Report*, Art 1, ¶ 3, reprinted in Marke & Samie, 1 *Antitrust and*

report for comment and to resume discussion in 1955. However, once again, the United States, in the form of the following statement from the Eisenhower Administration, dealt the death blow to the effort:

[D]ifferences which presently exist in national policies and practices . . . are of such magnitude that the proposed international agreement would be neither satisfactory nor effective in accomplishing its purpose . . . . [P]resent emphasis should be given not to international organizational machinery but rather to the more fundamental need of further developing effective national programs to deal with restrictive business practices, and of achieving a greater degree of comparability in the policies and practices of all nations in their approach to the subject.<sup>26</sup>

With the collapse of this new effort, the more ambitious multilateral efforts ceased for a number of years. On a more modest plane, the GATT adopted a resolution in 1960 recommending that the Contracting Parties consult with one another on the issue of restrictive business practices.<sup>27</sup> However, the next major effort came at the initiative of the developing countries.

### 3. *The UNCTAD Restrictive Business Practices Guidelines.*

In 1973, as part of a broader program designed to establish a New International Economic Order, the developing countries decided to pursue the negotiation of a multilateral code on restrictive business practices.<sup>28</sup> Negotiations began within the United Nations Conference on Trade and Development ("UNCTAD") on the subject of restrictive business practices.<sup>29</sup> In 1980, those efforts came

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*Restrictive Business Practices* § 5 D 2 at 29 (cited in note 18). Compare *Havana Charter*, Art 46, ¶ 3, reprinted in id § 5 D 1 at 1, 11-12.

<sup>26</sup> Economic & Social Council, *Restrictive Business Practices*, Comments of Governments, E/2612, Add 2, pp 4-5 (Apr 4, 1955), quoted in Edwards, *Control of Cartels and Monopolies* at 235 (cited in note 12). For a trenchant criticism of the Administration's position, by one of the participants in the ECOSOC ad hoc committee, see Sigmund Timberg, *Restrictive Business Practices as an Appropriate Subject for United Nations Action*, 1 Antitrust Bull 409 (1955).

<sup>27</sup> GATT resolution, BISD 28 (9th Supp, 1961).

<sup>28</sup> See UNCTAD, *Report of the Ad Hoc Committee of Experts on Restrictive Business Practices in Relation to the Trade and Development of Developing Countries*, UN Doc TD/B/C.2/119/Rev 1 (1974). On the link with the New International Economic Order program, see Sornarajah, 22 *Indian J of Intl L* at 15 (cited in note 12).

<sup>29</sup> On the restrictive practices addressed, see generally Sigmund Timberg, *Restrictive Business Practices in the International Transfer and Diffusion of Technology*, in Shachter

to a successful conclusion, when the U.N. General Assembly adopted the clumsily named "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices."<sup>30</sup>

For present purposes, only a few points about the Restrictive Business Practices Code ("the Code"), as it is more commonly called, are important. First, at the insistence of the developed countries, the Code is voluntary.<sup>31</sup> Second, at the insistence of the developing countries, the Code contains numerous hortatory provisions calling for special attention, or special concern, for the problems of the developing countries.<sup>32</sup> Finally, the Code's substantive provisions (contained in Section D) follow the general pattern of condemning collusive anticompetitive actions and individual firm abuses of dominant positions. The principles and rules for enterprises detailed in Section D of the Code are generally consistent with western concepts of anticompetitive practices. With respect to collective actions, the list includes price-fixing, collusive tendering, market or customer allocations, sales or production quotas, and various kinds of concerted refusals to deal.<sup>33</sup> With respect to single firm action, the Code includes various kinds of conduct to the extent that they may create an abuse of a dominant position, such as predatory behavior, discriminatory commercial terms, anticompetitive mergers, and some practices specifically relating to

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& Hellawell, *Competition in Intl Business* at 84 (cited in note 4). See also the U.N. Centre on Transnational Corporations work on a general Code of Conduct for Transnational Corporations, described in *The United Nations Code of Conduct on Transnational Corporations*, United Nations Centre on Transnational Corporations ST/CTC/SER.A/4, at 26-27 (UNCTC Current Studies, 1986) (discussing the legal nature of the Code, which has yet to be definitely settled in the negotiations).

<sup>30</sup> See UN Doc TD/RBP/CONF 10/Rev 1 (1980), endorsed by G A Res 63, UN Doc A/RES/35/63 (1980).

<sup>31</sup> For example, the Preamble specifically states that the Conference "hereby agrees on the following Set of Principles and Rules for the control of restrictive business practices, which take the form of recommendations." The verb form "should" is used throughout the text, rather than the mandatory "shall." The significance of the choice of a voluntary instrument is discussed in Joel Davidow and Lisa Chiles, *The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices*, 72 Am J Intl L 247 (1978). See also Arghyrios A. Fattourous, *The UN Code of Conduct on Transnational Corporations: A Critical Discussion of the First Drafting Phase*, in Norbert Horn, ed, *Legal Problems of Codes of Conduct for Multinational Enterprises* 103-125 (Kluwer B.V., 1980) (uncertainty about the legal nature of the Code); Hans W. Baade, *The Legal Effects of Codes of Conduct for Multinational Enterprises*, in Horn, ed, *Legal Problems of Codes of Conduct for Multinational Enterprises* at 3-38 (legal nature of codes of conduct for Multinational Enterprises in general).

<sup>32</sup> See, for example, Objective 4, § A; Equitable Principle 3, § C.

<sup>33</sup> See Restrictive Business Practices Code, § D.3.

imports and exports.<sup>34</sup> However, because the Code is nonbinding, most countries agreed that it did not originally constitute a source of international antitrust law, nor has it evolved into such a source.<sup>35</sup>

#### 4. *Current Discussion on Universal Competition Agreements.*

Recently, a group of lawyers from the American Bar Association's Antitrust Section completed a comprehensive study of international antitrust enforcement, in which they considered once again the desirability of pursuing a world-wide antitrust code.<sup>36</sup> They concluded that such a code was not a worthwhile goal on four grounds: (1) the near impossibility of meaningful agreement on standards, (2) the inadvisability of negotiating away critical conditions, (3) the benefits of nations' freedom to differ (due to the need from time to time to pursue non-efficiency goals), and (4) the problems of enforcement.<sup>37</sup> Even a narrow code limited to hard-core anti-cartel provisions seemed not to be worth the costs of various political quid pro quo measures the Committee foresaw.<sup>38</sup> The Committee concluded instead that efforts to harmonize national laws in key areas (such as cartel prohibitions, elimination of exemptions for export cartels, and procedural harmonization for merger enforcement) were more promising.<sup>39</sup> These conclusions are difficult to dispute, particularly in light of the lack of success within the Uruguay Round toward significantly liberalizing other difficult areas of multilateral economic activity, such as investment activities, trade in services, and agricultural trade.<sup>40</sup> The time for

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<sup>34</sup> See *id.* at § D.4.

<sup>35</sup> Although the point is not free from dispute, most international scholars agree that U.N. General Assembly resolutions do not, of their own force, constitute a source of international law. See generally Baade, *Legal Effects* at 5 (cited in note 31); Richard A. Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 *Am J Intl L* 782, 783-85 (1966). However, it is always possible that such a resolution may be evidence of an emerging consensus among nations on customary international law. One might argue that the Code contributes to the development of an international consensus against cartels and abuses of dominant positions, but concrete implementation of such a rule has taken place only within the context of domestic law.

<sup>36</sup> See American Bar Association, Section of Antitrust Law, *Report of the Special Committee on International Antitrust* ch 11 (Sept 1, 1991) ("1991 Special Committee Report").

<sup>37</sup> *Id.*, vol 1 at 289-90.

<sup>38</sup> *Id.* at 292-93.

<sup>39</sup> *Id.* at 294.

<sup>40</sup> To be sure, the problems with agricultural subsidies are different from those relating, for example, to trade in services; nevertheless, the desire to retain national sovereignty is a common thread running through all the difficulties.

universal competition law agreements, as well as universal agreements on a variety of other sensitive matters of economic policy, apparently has not yet arrived.

## B. Targeted Agreements and Rules

At the same time that global efforts were not producing satisfactory results, consensus on competition policy was growing among countries with similar forms of government, similar levels of development, and similar kinds of economies (that is, market-based, with varying degrees of government participation for social purposes). These occurred in three contrasting ways, each of which bears on the type of future effort that may succeed. The first example can be found in the Organization for Economic Co-operation and Development ("OECD") Guidelines for Multinational Enterprises, adopted in 1976 and revised several times since then—a voluntary set of rules, with some institutional oversight, adopted by the western developed democracies.<sup>41</sup> The second example is the EC itself: a commitment by the Member States to create a single internal market, with a supranational body of competition law, both substantive and procedural, enforced by a powerful supranational institution. Finally, one finds the bilateral antitrust cooperation agreements, which occupy an intermediate position between the first two examples: they provide more than the hortatory OECD Guidelines but far less than the EC has achieved.

### 1. *The Organization for Economic Co-operation and Development.*

The OECD's members are the twenty-four major industrialized nations of the world.<sup>42</sup> In 1976, the OECD adopted a broad set of Guidelines for Multinational Enterprises, covering disclosure of information, competition, taxation, employment and industrial re-

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<sup>41</sup> Earlier, in 1967, the Council of the OECD had adopted a Recommendation concerning Co-Operation between Member Countries on Restrictive Business Practices Affecting International Trade. OECD Council Rec, Doc C(67)53 (Oct 5, 1967). As the name suggests, however, that recommendation dealt with voluntary intergovernmental cooperation rather than specific competition standards. The Council also passed a Recommendation Concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade on December 20, 1973, reprinted in 19 Antitrust Bull 283 (1974), OECD doc C[73]99[Final].

<sup>42</sup> The members are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

lations, and science and technology.<sup>43</sup> The competition guidelines recommend that, "while conforming to the official competition rules and established policies of the countries in which they operate," enterprises should refrain from actions that would abuse a dominant position (giving the examples of anticompetitive acquisitions, predatory behavior, unreasonable refusals to deal, abuse of industrial property rights, and discriminatory pricing), allow purchasers reasonable freedom to resell and export, refrain from participating in cartels, and cooperate with local authorities.<sup>44</sup> The Guidelines assign oversight responsibility to the OECD's Committee on International Investment and Multinational Enterprises ("CIME").

The OECD has served successfully as a forum for the exchange of information among the competition authorities of its member nations, and it has helped to facilitate a great deal of voluntary cooperation.<sup>45</sup> In this sense, it has undoubtedly moved the cause of international consensus on competition rules forward and has made possible better coordination of national policies among its members. The fruits of this process are evident in the bilateral agreements discussed below. It would be wholly inaccurate, however, to say that the OECD Guidelines created any sort of binding international antitrust rules: the Guidelines were never intended to carry such force, and it is clear that the member states would never have agreed to them if they had been.

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<sup>43</sup> The Guidelines appear as an Annex to the Declaration by the Governments of the OECD Member Countries and Decisions of the OECD Council on Guidelines for Multinational Enterprises, National Treatment, International Investment Incentives and Disincentives, and Consultation Procedures, in the Declaration on International Investment and Multinational Enterprises, OECD Doc C(76) 99 (Final) (June 21, 1976), reprinted in 15 ILM 967, 969 (1976) ("*Guidelines*"). For a short commentary, see Daniel J. Plaine, *The OECD Guidelines for Multinational Enterprises*, 11 Intl Lawyer 339 (1977).

<sup>44</sup> OECD, *Guidelines*, section on Competition (cited in note 43).

<sup>45</sup> The OECD has continued to work in the area of restrictive business practices. It passed a Council Recommendation Concerning Action Against Restrictive Business Practices Affecting International Trade Including Those Involving Multinational Enterprises, OECD Doc C(78)133 (Final) (Aug 9, 1978), calling on member states to adopt legislation that effectively prohibited or controlled abuses of dominant positions or cartels, and to cooperate effectively in enforcement practices. See also, Council Recommendation Concerning Co-Operation Between Member Countries on Restrictive Business Practices Affecting International Trade, OECD Doc C(79)154 (Final) (Oct 5, 1979), focusing on notifications, exchanges of information, consultations, and coordination of action; and a revision of the 1979 Recommendation passed in 1986, OECD Doc C(86)44 (Final) (June 5, 1986).

## 2. *The European Economic Community.*

The European Economic Community, or the EC as it has become, stands as the counter-example to everything discussed so far. It represents the one instance where a group of nations have successfully implemented an agreement to create a supranational competition law regime, which takes precedence over national law in cases of conflict.<sup>46</sup> The content of that law is familiar to any American antitrust lawyer. Article 85(1) prohibits anticompetitive agreements between undertakings, such as price-fixing, limitations on production, divisions of markets, and tying arrangements, in a manner reminiscent of Section 1 of the Sherman Act.<sup>47</sup> Article 86, which prohibits the abuse of a dominant position, reaches the same kind of practices as one would condemn under Section 2 of the Sherman Act.<sup>48</sup> The Merger Regulation of December 1990 provides a review mechanism for concentrative transactions that have a "Community dimension," and it permits the Commission to forbid any merger that might create or strengthen a dominant position within the Common Market.<sup>49</sup> Though important differences also exist between Community competition law and its U.S. counterpart,<sup>50</sup> the point here is simply that one is not comparing apples

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<sup>46</sup> EEC, Arts 85, 86. See generally Joined Cases 56/64 and 58/64, *Grundig & Consten v Commission*, 1966 ECR 299, 1966 CMLR 418; Case 6/64, *Costa v Ente Nazionale Per L'Energia Elettrica (ENEL)*, 1964 ECR 585, 1964 CMLR 425; Case 45/85, *Verband der Sachversicherer v Commission*, 1987 ECR 405, 1988:4 CMLR 264. In the competition area particularly, see Case 14/68, *Wilhelm v Bundeskartellamt*, 1969 ECR 1, 1969 CMLR 100; Case 53/69, *Sandoz v Commission* ("Dyestuffs"), 1972 ECR 845.

See also Ritter, Rawlinson & Braun, *Practitioner's Guide* at 36-41 (cited in note 21); Edward & Lane, *European Community Law* at 32 (cited in note 21); and Jean-François Verstrynge, *The Relationship Between National and Community Antitrust Law*, 3 Nw J Intl L & Bus 358, 370-71, 373-376 (1981). Compare Kurt Markert, *Some Legal and Administrative Problems of the Co-Existence of Community and National Competition Law in the EC*, 11 Common Mkt L Rev 92-99 (1974).

<sup>47</sup> Goyder, *EC Competition Law* at 12 (cited in note 21); Ritter, Rawlinson, & Braun, *Practitioner's Guide* at 59 n 13 (cited in note 21); Edward & Lane, *European Community Law* at 68 (cited in note 21).

<sup>48</sup> Goyder, *EC Competition Law* at 12 (cited in note 21); Edward & Lane, *European Community Law* at 68 (cited in note 21).

<sup>49</sup> Merger Regulation, Council Reg 4064/89, 1990 OJ L257:14 (corrected version at 1989 OJ L395:1). Ritter, Rawlinson, & Braun, *Practitioner's Guide* at 339-41, 353-54, 357-59 (cited in note 21). For a discussion of early experience under the Merger Regulation, see id at 437-51; Michael J. Reynolds, *The First Year of Enforcement Under the EC Merger Regulation: A Private View*, in Barry Hawk, ed, *Annual Proceedings of the Fordham Corporate Law Institute: EC and U.S. Competition Law and Policy* 649 (Transnational Juris, 1992).

<sup>50</sup> For example, in Article 85(1)(d) and in Article 86(c), the Treaty specifically condemns discriminatory practices in a manner that goes well beyond the U.S. Robinson-Patman Act, Clayton Act § 2(a), 15 USC § 12 (1988). Article 86 begins its list of abusive practices with "unfair purchase or selling prices," which is not illegal in itself in the United States. The substantive standards for assessing mergers appear at the present time to be

and oranges when one looks at EC competition law and U.S. law; rather, it is more like comparing Delicious and Macintosh.

The story of the Community's success in creating its body of supranational competition law rests primarily on the central role of competition law in the broader process of market integration undertaken by the Member States. Case after case from the European Court of Justice ("ECJ") reiterates the importance of Article 3(f) of the Treaty, which lists as one of the central goals of the Treaty the "institution of a system ensuring that competition in the common market is not distorted."<sup>51</sup> The competition rules of Articles 85 and 86 have direct effect in the Member States, which means that they apply among individuals, and between individuals and the governments of the Member States, without any need for further national legislation.<sup>52</sup> The political commitment the Member States made when they decided to join the Community therefore included a political commitment to unified competition rules.

The close relationship between the degree of unification implied by Community membership and competition law is well illustrated by the difficulties that arose over the new European Economic Area ("EEA") that was designed to bring together the EC countries and the European Free Trade Area ("EFTA") countries in a way that did not involve full Community membership for the latter. After nearly two decades of bilateral free trade agreements between the Community and the EFTA countries,<sup>53</sup> the two regions agreed on October 21, 1991, to create a European Economic

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more permissive than their U.S. counterparts, although it is admittedly too early to come to firm conclusions. See generally about EC merger law, Barry Hawk, ed, *Annual Proceedings of the Fordham Corporate Law Institute: International Mergers and Joint Ventures* (Transnational Juris, 1991).

<sup>51</sup> EEC, Art 3(f). See, for example, Case 6/72, *Continental Can v Commission*, 1973 ECR 215, 243-45, 1973 CMLR 199, 223-25; Case 85/76, *Hofmann-La Roche v Commission*, 1979 ECR 461, 520, 1979:3 CMLR 211, 274; Case 322/81, *Michelin v Commission*, 1983 ECR 3461, 3503, 1985:1 CMLR 282, 321.

<sup>52</sup> See Case 26/62, *N.V. Algemene Transport-en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen*, ("van Gend en Loos"), 1963 ECR 1, 12, 1963 CMLR 105, 130-131. See also Ritter, Rawlinson, & Braun, *Practitioner's Guide* at 707-90 (cited in note 21); Goyder, *EC Competition Law* at 297, 354, 356 (cited in note 21).

<sup>53</sup> There are seven free trade agreements, between the EC on the one side, and respectively Austria, Switzerland, Portugal, Sweden, Iceland, Norway, and Finland, on the other side. See Agreements between the European Community and: 1) Austria, 1972 OJ L300:2 (effective Jan 1, 1973); 2) Finland, 1973 OJ L328:2 (effective Jan 1, 1974); 3) Iceland, 1972 OJ L301:2 (effective Apr 1, 1973); 4) Norway, 1973 OJ L171:2 (effective Jul 1, 1973); 5) Portugal, 1972 OJ L301:165 (effective Jan 1, 1973); 6) Sweden, 1972 OJ L300:97 (effective Jan 1, 1973); and 7) Switzerland, 1972 OJ L300:189 (effective Jan 1, 1973). See also Neville March Hunnings, *Enforceability of the EC-EFTA Free Trade Agreements*, 2 Eur L Rev 163, 164 (1977); Jean-Francois Bellis, *The Interpretation of the Free Trade Agreements*



Area that would go beyond the bilaterals in a number of important respects, while falling short of conferring full EC membership on the EFTA countries.<sup>54</sup> In particular, the EEA agreement went significantly further than the free trade agreements had gone toward creating a single, harmonized competition regime for all of Europe.<sup>55</sup> Substantively, the agreement represents the wholesale adoption of EC competition law *as it now stands*—that is, the *acquis communautaire*—by the entire EEA: the rules dealing with cartels, the prohibitions of abuses of dominant positions, the rules governing state monopolies and enterprises with special or exclusive rights, and the control of state aids.<sup>56</sup> Procedurally and institutionally, however, this goal proved more difficult to achieve than the negotiators had expected.

On December 16, 1991, the ECJ ruled that the EEA was incompatible with the Treaty of Rome, because it undermined the legal independence of the court and failed to guarantee consistency of legal rules across the entire EC.<sup>57</sup> In particular, competition cases would have gone to a new hybrid tribunal composed of judges from the ECJ and from the EFTA authority, which was unacceptable to the ECJ. Back at the negotiation table, the parties were able to reach final agreement in February 1992 only by stipulating that, in the area of competition law, the ECJ would be solely responsible for all cases unless they concerned only EFTA-based entities within EFTA itself.<sup>58</sup> In other words, harmonization of competition law and competition institutions was possible only because one group of countries was willing politically to accept the other group's system.

The lesson from the EC is thus that an international antitrust law among a small group of countries that previously had diverse laws, but that are committed to wide-ranging economic integration,

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*Between the EFTA Countries and the European Community*, 23-25 Swiss Review of Intl Competition L 21 (1985).

<sup>54</sup> See Claus-Dieter Ehlermann, *Antitrust Issues in an International Dimension*, 1992 U Chi Legal F 241, 248-51.

<sup>55</sup> The earlier free trade agreements had provided that cartels and concerted practices and abuses of dominant positions, to the extent that they might affect trade between the Community and the other signatory, were incompatible with the proper functioning of the Agreements. See Art 23 (in each treaty). The competition provisions of the free trade agreements are discussed in Ernst-Joachim Mestmäcker, *Providing Fair Conditions of Competition Under the Free Trade Agreements of the European Economic Community*, 3 Nw J Intl L & Bus 296 (1981).

<sup>56</sup> See Ehlermann, 1992 U Chi Legal F at 249-51 (cited in note 54).

<sup>57</sup> See 8 Intl Trade Rptr (BNA) 1834 (Dec 18, 1991).

<sup>58</sup> See *EC Foreign Ministers Agree to Flexibility on Legal Jurisdiction in EEA Negotiations*, Intl Trade Daily (BNA) (Feb 6, 1992).

can be achieved and, indeed, has been achieved. The lesson from the EEA is less encouraging, if it means that international anti-trust rules require either complete economic integration or full-blown acceptance of one system or the other. The limited nature of the bilateral agreements that the United States has negotiated with countries that individually have strong internal competition laws stands in sharp contrast to these European experiences. As such, the bilaterals perhaps illustrate the pessimistic notion that competition law cannot be harmonized outside the context of more ambitious agreements. On the other hand, they may show only that serious thinking about intermediate solutions is still in its infancy.

### 3. *Bilateral cooperation agreements.*

The earliest bilateral cooperation agreements concerning competition in the United States were contained within broader commercial treaties of "friendship, commerce, and navigation." For example, the 1960 Convention of Establishment between the United States and France provides, in Article XI, that

Each High Contracting Party will take the measures it deems appropriate with a view to preventing commercial practices or arrangements, whether effected by one or more private or public commercial enterprises, which restrain competition, limit access to markets or foster monopolistic control, whenever such practices or arrangements have or might have harmful effects on trade between the two countries.<sup>59</sup>

Article XVIII of the Treaty of Friendship, Commerce, and Navigation between the United States and Japan includes similar language, as well as a commitment to consult when difficulties arise,<sup>60</sup> as do many of the other treaties.<sup>61</sup> In light of the unfortunate history of diplomatic tensions due to extraterritorial antitrust en-

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<sup>59</sup> Convention of Establishment between the United States of America and France, TIAS 4625, 11 UST 2398, 2413 (entered into force Dec 21, 1960).

<sup>60</sup> Treaty of Friendship, Commerce and Navigation between the United States of America and Japan, TIAS 2863, 4 UST 2063, 2077 (entered into force Oct 30, 1953).

<sup>61</sup> See, for example, Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of Greece, Art XIV, TIAS 3057, 5 UST 1829, 1861 (entered into force Oct 13, 1954); Treaty of Friendship, Commerce and Navigation between the United States of America and Israel, Art XVIII, TIAS 2948, 5 UST 550, 569 (entered into force Apr 3, 1954); Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Korea, Art XVIII, TIAS 3947, 8 UST 2217, 2230 (entered into force Nov 7, 1957).

forcement efforts that has characterized most of the postwar period, it is fair to conclude that these treaties did little to further bilateral antitrust cooperation.

Later, more specific antitrust cooperation agreements were negotiated, including arrangements with Germany,<sup>62</sup> Australia,<sup>63</sup> and Canada.<sup>64</sup> These agreements all followed the model suggested by the 1967 OECD Recommendation, in that they included agreements to assist one another, both in antitrust investigations (to the extent compatible with domestic law) and in gathering information within the other's jurisdiction, and to respect confidentiality restrictions. Both the Australian and Canadian agreements emphasize the need to reduce the conflicts that had arisen over enforcement actions affecting conduct or parties outside the United States.<sup>65</sup> Nothing in any of these bilaterals was designed to move the signatories' substantive policies closer together, or to create a harmonized procedural regime for multinationals. Their goals were more modest: conflict management (if not total avoidance), cooperation in enforcement within the limits of each country's enforcement powers and confidentiality laws, and the greater understanding that can come from regular consultations.

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<sup>62</sup> Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, TIAS 8291, 27 UST 1956 (entered into force Sept 11, 1976). See also the Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany, TIAS 3593, 7 UST 1839 (entered into force July 14, 1956).

<sup>63</sup> Agreement between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters, June 29, 1981, reproduced in 21 ILM 702 (1982).

<sup>64</sup> Memorandum of Understanding as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, 23 ILM 275 (1984). There were several earlier agreements with Canada. See Comment, *The Canada-United States Memorandum of Understanding Regarding Application of National Antitrust Law: New Guidelines for Resolution of Multinational Antitrust Enforcement Disputes*, 6 Nw J Intl L & Bus 1065, 1082-86 (1984-85); B. R. Campbell, *The Canada-United States Antitrust Notification and Consultation Procedure: A Study in Bilateral Conflict Resolution*, 56 Canadian Bar Rev 459, 460-63 (1978). See an earlier informal 1959 agreement, Joint Statement Concerning Cooperation in Antitrust Matters issued by the Canadian Consumer and Corporate Affairs Minister and the U.S. Attorney General, dated November 3, 1969, reproduced at 8 ILM 1305 (1969).

<sup>65</sup> In the Australian agreement, every substantive article except Article 5, which deals with cooperation, is devoted to the issue of conflict management.

The 1984 Canadian MOU lists two formal purposes in section 1: (1) the avoidance or moderation of conflicts of interests and policies; and (2) closer cooperation in enforcement. In light of the strains noted in the articles cited in note 64 above, the order in which these are listed is no accident.

The U.S.-EC Agreement of September 23, 1991, goes beyond its predecessor agreements in a variety of ways.<sup>66</sup> Rather than growing out of the animosity created by conflicting claims to jurisdiction, it grows out of a consensus on both sides of the Atlantic that "sound and effective enforcement of competition law is a matter of importance to the efficient operation" of both markets.<sup>67</sup> Resolution of differences is still an important purpose,<sup>68</sup> but this process is handled in a new, more positive way than was the case in predecessor agreements. Article VI, devoted to Conflict Avoidance, calls on the Parties to consider a list of six factors, in addition to anything else that is appropriate, in seeking an appropriate resolution:

- 1) the relative significance to the anticompetitive activities involved of conduct within the enforcing Party's territory as compared to conduct within the other Party's territory;
- 2) the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers, or competitors within the enforcing Party's territory;
- 3) the relative significance of the effects of the anticompetitive activities on the enforcing Party's interests as compared to the effects on the other Party's interests;
- 4) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;
- 5) the degree of conflict or consistency between the enforcement activities and the other Party's laws or articulated economic policies; and
- 6) the extent to which enforcement activities of the other Party with respect to the same persons, including judg-

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<sup>66</sup> For the full text, see 61 *Antitrust & Trade Reg Rep* (BNA) 382 (Sept 26, 1991) (referred to here as "U.S.-EC Agreement"). Although the agreement is presently in force, it must be noted that on December 16, 1991, the French Government filed a challenge to it with the ECJ, arguing that the Commission exceeded its authority in signing the agreement with the U.S. antitrust agencies without receiving the approval of the EC Council of Ministers, as the French argued was required pursuant to Article 228 of the Treaty of Rome. The Commission's position is that the agreement merely implements Articles 85 and 86 of the Treaty, and is therefore not subject to the Article 228 procedure. See 62 *Antitrust & Trade Reg Rep* (BNA) 45 (Jan 15, 1992).

<sup>67</sup> U.S.-EC Agreement, Preamble, ¶ 3 (cited in note 66).

<sup>68</sup> *Id.*, ¶ 5. See also Art II (Notification); Art VI (Avoidance of Conflicts over Enforcement Activities), and Art VII (Consultation).

ments or undertakings resulting from such activities, may be affected.<sup>69</sup>

Such a structured list of "positive comity" factors is unprecedented in an international understanding relating to competition policy.<sup>70</sup> This much was possible only because of the significant convergence, on the substantive level, between European law and American law.

In addition, the cooperative provisions rest on the premise that the two sets of competition laws, while obviously not identical, are functionally equivalent. Article III.1 states that the "Parties agree that it is in their common interest to share information that will . . . facilitate effective application of their respective competition laws." Article IV.2 sets up a procedure for coordinating related enforcement actions. When anticompetitive actions occur within the territory of one Party, while harming the interests of the other, the injured Party may "request that . . . the competition authorities [of the Party where the action is occurring] initiate appropriate enforcement activities."<sup>71</sup> In other words, if an American cartel is harming European interests, the Commission can ask the Antitrust Division of the Justice Department to initiate a suit against the cartel; or if a European cartel is harming American interests, the U.S. can similarly approach the Commission. Although the agreement carefully avoids mandating this type of reciprocal enforcement activity, the mere establishment of such a procedure represents a breakthrough in antitrust cooperation.

Yet, stepping back, the real story is still the modesty of the agreement. The U.S.-EC Agreement is still a far cry from the more ambitious proposals detailed by former Assistant Attorney General Rill,<sup>72</sup> or the recent proposals from the EC Competition Commissioner, Sir Leon Brittan.<sup>73</sup> One must ask the question why two great entities—the EC and the U.S.—so similar in political outlook, so similar in economic development, and so similar in atti-

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<sup>69</sup> Id., Art VI, ¶ 3.

<sup>70</sup> The list is essentially the same as the one in the 1988 Department of Justice Antitrust Guidelines for International Operations, § 5 n 170. The commitment to consider them is consistent with the position taken by the ALI's *Restatement (Third) of the Law of Foreign Relations of the United States* § 403 (1987), except that the ALI indicates that consideration of the comity factors is mandatory, and neither signatory would go that far.

<sup>71</sup> U.S.-EC Agreement, Art IV.2.

<sup>72</sup> See James Rill, *Creating and Maintaining Competition in a Common Market: The Future of Antitrust in an Integrated World Economy*, 1992 U Chi Legal F 263, 270-75.

<sup>73</sup> See Speech of Sir Leon Brittan (cited in note 21).

tude toward competition policy, did not go further.<sup>74</sup> The answer can be found, in part, in the jurisdictional rules that still prevail for public economic regulations such as antitrust law and, in part, in the more subtle procedural and substantive differences that have proven so difficult to overcome.

## II. EXTRATERRITORIALITY: THE SUBSTITUTE FOR INTERNATIONAL AGREEMENT?

### A. The *Lex Americana* Era

Competition law has never fallen within the fields of private law that are enforceable across national lines, in the same way that a U.S. court will not hesitate to honor a contractual provision choosing English law as the law of a contract,<sup>75</sup> or to apply Cambodian law to a wrongful death claim.<sup>76</sup> Instead, as Justice Holmes assumed in *American Banana Co. v United Fruit Co.*, antitrust legality originally depended upon "the law of the country where the act is done."<sup>77</sup> Given the nature of multinational business activity, however, the strict territoriality of *American Banana* did not last long in the United States.<sup>78</sup> Instead, jurisdictional doctrines were quickly developed that brought within the scope of U.S. antitrust law any actions taken abroad that had an anticompetitive effect within the United States.<sup>79</sup> The best known of these was the "intended effects" rule of *United States v Aluminum Co.*

<sup>74</sup> The same question can be asked, incidentally, of the United States and Canada, which are committed to resolving the problems of cross-border dumping and subsidies within the context of the U.S.-Canada Free Trade Agreement, reprinted at 27 ILM 281 (1988), but which have so far resisted the notion of opening up the borders and simply using their respective competition laws for any problems that arise. See generally Conference, *Canada-United States Free Trade Agreement: Implementation of Chapter 19*, 17 Can-US L J (1991); Ivan R. Feltham, Stuart A. Salen, Robert F. Mathieson, and Ronald Wonnacott, *Competition (Antitrust) and Antidumping Laws in the Context of the Canada-United States Free Trade Agreement*, 17 Can-US L J 71, 123-24, 158-59, 166 (1991).

<sup>75</sup> *The Bremen v Zapata Off-Shore Co.*, 407 US 1, 12-14, 15 (1972).

<sup>76</sup> *Day & Zimmermann, Inc. v Challoner*, 423 US 3, 4-5 (1975).

<sup>77</sup> 213 US 347, 356 (1909).

<sup>78</sup> See, for example, *United States v Sisal Sales Corp.*, 274 US 268 (1927); *United States v American Tobacco Co.*, 221 US 106 (1911); *United States v Pacific & Arctic Ry.*, 228 US 87 (1913); *Thomsen v Cayser*, 243 US 66 (1917). See generally James R. Atwood and Kingman Brewster, *Antitrust and American Business Abroad* §§ 6.02-6.08, pp 142-56 (McGraw Hill, 2d ed 1981).

<sup>79</sup> From the point of view of public international law, the decision in the case of the S.S. "*Lotus*," 1927 Permanent Court of International Justice, ser E No 4 at 166, established the proposition that international law did not prohibit states from asserting jurisdiction when actions outside their jurisdiction had sufficiently direct effects within their authority. The applicability of this principle to economic regulation, as opposed to the classic case of the gunman firing a shot across the border, has been controversial. See, for example, the

of America ("Alcoa"),<sup>80</sup> under which conduct undertaken abroad by foreign nationals was subject to the U.S. antitrust laws if it was intended to affect U.S. markets, and actually had some effect.

After *Alcoa*, an era of aggressive extraterritorial enforcement of U.S. antitrust law began. A number of factors probably account for this: increasing global activity on the part of business enterprises; the economic and political dominance of the United States during the first decades after World War II; the acceptance within the United States of the theory of effects jurisdiction; and, of course, the lack of any international machinery to address genuine transnational competition problems. The U.S. government brought sweeping cases in many industries: oil,<sup>81</sup> titanium dioxide,<sup>82</sup> international shipping,<sup>83</sup> Swiss watchmaking,<sup>84</sup> and many others.<sup>85</sup> The ability, for a time, to enforce antitrust standards through unilateral action undoubtedly made the need for a multilateral code seem less urgent to pro-antitrust forces in the U.S. Congress and administrations. But extraterritorial enforcement brought its own problems, producing countermeasures of increasing strength on the part of countries who resented this type of interference with their own economic policies.<sup>86</sup>

Initially, the opposition to extraterritorial enforcement actions was grounded in both substantive and procedural concerns. With the exception of Germany and Japan, which had U.S.-style anti-

record of diplomatic protest chronicled in Atwood & Brewster, *Antitrust and American Business Abroad* § 4 (cited in note 78).

<sup>80</sup> 148 F2d 416 (2d Cir 1945).

<sup>81</sup> See *In re Investigation of World Arrangements*, 13 FRD 280 (D DC 1952), as described more fully in Atwood & Brewster, *Antitrust and American Business Abroad* at § 2.24 (cited in note 78).

<sup>82</sup> *United States v National Lead Co.*, 63 F Supp 513 (S D NY 1945), aff'd, 332 US 319 (1947).

<sup>83</sup> *In re Grand Jury Investigation of the Shipping Industry*, 186 F Supp 298 (D DC 1960).

<sup>84</sup> *United States v Watchmakers of Switzerland Info Center*, 1963 Trade Cases (CCH) ¶ 70,600, judgment modified, 1965 Trade Cases (CCH) ¶ 71,352 (S D NY 1965).

<sup>85</sup> See generally Atwood & Brewster, *Antitrust and American Business Abroad* § 6, at 142-81, ¶ 2.23-2.24, at 41-47 (cited in note 78); Wilbur L. Fugate, 1 *Foreign Commerce and the Antitrust Laws* ¶ 2, vol II, ¶ 15 (Little, Brown & Co, 3d ed 1982); Barry E. Hawk, 1 *United States, Common Market and International Antitrust: A Comparative Guide* ch I, B, 12-13, ch II, 114-17 (2d ed 1986).

<sup>86</sup> See, for example, *British Nylon Spinners, Ltd. v Imperial Chemical Industries, Ltd.*, 1952:2 All England Law Reports 780; Uranium Information Security Regulations, Canada Stat O&R 76-644 (Sept 21, 1976); [British] Protection of Trading Interests Act 1980, c 11. The United States until recently took little account of the interests of foreign governments when foreign law fell short of clear compulsion. Compare, *Continental Ore Co. v Union Carbide & Carbon Corp.*, 370 US 690 (1962); with *Interamerican Refining Corp. v Texaco Maracaibo, Inc.*, 307 F Supp 1291 (D Del 1970).

trust laws imposed upon them by U.S. occupation forces,<sup>87</sup> and Canada, which had a largely unenforced competition law on its books,<sup>88</sup> the rest of the world had not yet "gotten religion" on this point. Over time, the substantive picture changed. Most importantly, when the original Six Member States created the Common Market in 1958, they became committed in principle to competition rules that were quite similar to those in the United States.<sup>89</sup> The adoption in 1962 of Regulation 17, which created most of the machinery for the enforcement of Articles 85 and 86, set in motion the development of antitrust law pursuant to these articles.<sup>90</sup>

Even with substantive convergence, objections to extraterritorial enforcement, based on procedural grounds, continued. Interestingly, however, the remaining problems in this area tended to arise from private litigation in the United States, rather than government litigation. Examples here include the uranium cartel suit,<sup>91</sup> the *Laker* case (over the failure of Freddie Laker's discount trans-Atlantic air service),<sup>92</sup> and the recent insurance litigation.<sup>93</sup> The bilateral antitrust cooperation agreements or memoranda of understanding with Canada, Australia, and Germany that were discussed earlier contributed substantially toward eliminating the intergovernmental tensions of the earlier era, but they studiously avoided any concessions on jurisdictional theory. In addition, two efforts to clarify the reach of U.S. law had the effect of communi-

<sup>87</sup> Fugate, 2 *Foreign Commerce and the Antitrust Laws* at 394-95 (cited in note 85) (Japan); Kurt Stockmann and Volkmar Strauch, *Federal Republic of Germany* § 1.03(1), (2), in von Kalinowski, B5 *World Law of Competition* (cited in note 3).

<sup>88</sup> An Act for the Prevention and Suppression of Combinations formed in Restraint of Trade, S C 1889, c 41 was incorporated into the Criminal Code in 1892, where the provisions remained until 1960. At that time, this law was consolidated with the Combines Investigation Act, R S, c C-23, which was later amended by: c 10 (1st Supp); c 10 (2d Supp), 1974-75-76, c 76; 1976-77, c 28; 1985, c 19; 1986, c 26.

<sup>89</sup> See note 21 and sources cited therein.

<sup>90</sup> Council Reg 17/62, 1962 OJ 204, later amended by Council Reg 59/62, 1962 OJ 1655, Council Reg 118/63, 1963 OJ 2696, and Council Reg 2822/71, 1971 OJ L285:49.

<sup>91</sup> For three nations' perspectives on the uranium case, see, for example, *In re Uranium Antitrust Litigation*, 617 F2d 1248 (7th Cir 1980); *Rio Tinto Zinc Corp. v Westinghouse Electric Corp.*, 1978:1 All England Law Reports 434 (House of Lords, 1977), 1978:2 WLR 81; *Gulf Oil Corp. v Gulf Canada Ltd.*, 1980-1 Trade Cases (CCH) ¶ 63, 285 (Can S Ct 1980). See also Fugate, *Foreign Commerce and the Antitrust Laws* at ¶ 2.16, at 94-97 (cited in note 85); Hawk, *Antitrust: A Comparative Guide* at 549-53 (cited in note 85).

<sup>92</sup> *Laker Airways Ltd. v Sabena, Belgian World Airlines*, 731 F2d 908 (DC Cir 1984). Compare *British Airways Board v Laker Airways Ltd.*, 1984:3 All England Law Reports 39 (House of Lords).

<sup>93</sup> See *In re Insurance Antitrust Litigation*, 938 F2d 919 (9th Cir 1991), petitions for cert granted sub nom *Hartford Fire Ins. Co. v California*, No 91-1111, *Merrett Underwriting Agency Management Ltd. v California*, No 91-1128, *Winterthur Reinsurance Corp. v California*, No 91-1131, *Unionamerica Ins. Co. v California*, No 91-1146, 113 S Ct 52 (1992).



cating a more moderate position to the rest of the world: the 1982 amendments to the antitrust laws that restricted jurisdiction in non-import cases to instances where a "direct, substantial, and reasonably foreseeable" effect could be found;<sup>94</sup> and the development of a comity-based balancing test by many courts of appeal, under which cases could be dismissed if the U.S. interest was deemed insufficient.<sup>95</sup>

Furthermore, outside the EC, North America, and Australia, competition law principles and enforcement practices continued to vary widely from country to country. Some feared that this left powerful multinational firms essentially unregulated;<sup>96</sup> others, speaking for those firms, claimed that it left them in an impossible situation, commanded or encouraged by one sovereign to take one action, and forbidden by another to pursue the identical conduct.<sup>97</sup> In addition, the developing countries became aware that restrictive business practices could harm their economies, yet they felt unable unilaterally to regulate multinational practices. Their response, as noted above, was to stress the importance of the UNCTAD Restrictive Business Practices Code, but the Code's practical effects have been minimal.

## B. If You Can't Beat Them, Join Them

Gradually, as the EC became more powerful economically and as extraterritorial theory itself became more refined, extraterritoriality began to be accepted within the Community. The Commission argued in the 1972 *Imperial Chemical Industries, Ltd. v Com-*

<sup>94</sup> Foreign Trade Antitrust Improvement Act of 1982, 15 USC § 6a.

<sup>95</sup> *Timberlane Lumber Co. v Bank of America*, 549 F2d 597 (9th Cir 1976) ("Timberlane I"); *Timberlane Lumber Co. v Bank of America*, 574 F Supp 1453 (N D Cal 1983) ("Timberlane II"); *Timberlane Lumber Co. v Bank of America*, 749 F2d 1378 (9th Cir 1984), cert denied, 472 US 1032 (1985). See also *Mannington Mills, Inc. v Congoleum Corp.*, 595 F2d 1287 (3d Cir 1979), for an alternative formulation of the balancing test.

<sup>96</sup> Cynthia Day Wallace wrote an entire book examining the ways in which multinationals are and are not effectively regulated. See Cynthia Day Wallace, *Legal Control of the Multinational Enterprise* (Martinus Nijhoff, 1983), where she notes that "we must confront the issue of whether the [multinational enterprise] is at present subject to any form of control, or whether, as is popularly alleged, it runs rough-shod, unfettered and uncontrolled across national boundaries, with no heed to national jurisdictions and no answerability to higher authority." *Id* at xvii.

<sup>97</sup> See, for example, the commentary on the foreign sovereign compulsion defense contained in the American Bar Association Section of Antitrust Law and Section of International Trade and Practice, *Report to the House of Delegates on the Draft U.S. Department of Justice Antitrust Guidelines for International Operations*, 57 Antitrust L J 651, 664-68 (1988) (noting in particular that a defense was appropriate when a firm took certain actions under the equivalent of duress imposed by the foreign government).

mission ("ICI-Dyestuffs"), that the Community could assert jurisdiction over conduct undertaken in non-Member States, if that conduct had harmful effects within the Community.<sup>98</sup> The ECJ adopted a more cautious approach and instead found, first, that the agreements to increase prices had been implemented within the Community and, second, that the companies' subsidiaries within the Common Market carried out the instructions of the parent firms.<sup>99</sup> In the 1988 decision in *Re Wood Pulp Cartel: A Ahlstrom Oy v Commission*, the ECJ took another step toward recognition of a general effects theory, when it decided to hold the members of a foreign-based export cartel, whose products were sold within the Community, subject to EC law.<sup>100</sup> The sales into the Community provided the necessary link to EC territory, or more generally validated the EC's regulatory interest in the foreign conduct. With the exception of the rare case, such as one in which foreigners were refusing to deal with EC customers, in which the *Wood Pulp* rule indicates that no jurisdiction would exist, the reach of European law is now almost coexistent with its U.S. counterpart.<sup>101</sup>

### C. The New Conflicts

Consensus on the proposition that national boundaries are of little if any relevance to the anticompetitive *behavior* of multinational enterprises has led to increasing international support for national jurisdiction that reaches extraterritorial actions with sufficiently important internal effects. Ironically, however, agreement on extraterritorial jurisdiction has given birth to a new set of problems, which are pushing us back toward the model of international agreements on competition. As long as most countries confined the application of their rules to conduct within their own territories, enterprises could determine with a fair degree of certainty what conduct was permissible and what was not, building into that

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<sup>98</sup> See *Dyestuffs Cartel*, Commission Order of July 24, 1969, 1969 OJ L195:11, 1969 CMLR D23.

<sup>99</sup> Case 48/69, *Imperial Chemical Industries, Ltd. v Commission* ("ICI-Dyestuffs"), 1972 ECR 619, 661-63, 1972 CMLR 557, 629.

<sup>100</sup> Cases 89/85, 104/85, 114/85, 116/85, 117/85, 125/85, 126/85, 127/85, 128/85, 129/85, *Re Wood Pulp Cartel: A Ahlstrom Oy v EC Commission*, 1988 ECR 5193, 5242-5243, 1988:4 CMLR 901.

<sup>101</sup> The recent announcement by the U.S. Department of Justice that foreign-based cartels that were refusing to purchase from U.S. exporters might also be challenged by American authorities represents another area of jurisdictional dispute. See Speech of Sir Leon Brittan, at 16-17 (cited in note 21).

determination the risk that a private suit might also be brought in the U.S. The triumph of effects jurisdiction, in contrast, has multiplied several times over the number of different jurisdictions in which regulatory claims must be satisfied.

Merger law provides the best example of the brave new world. Major mergers and acquisitions involving firms with plants or subsidiaries in Canada, the United States, and the EC, must now notify their plans to each jurisdiction, according to the timetable set out by each, furnishing the substantive information required by each. The administrative burdens are significant.<sup>102</sup> Worse, the substantive standards are not entirely harmonious. The Community may wish to permit a merger, while either Canada or the United States may wish to enjoin it. If the transaction falls below the value thresholds necessary for Community jurisdiction,<sup>103</sup> the overlapping jurisdictions may include many of the Member States of the Community, as well as the North American countries. When the possibility of private litigation intervening in the United States is added to the picture, it is clear that new mechanisms for coordinating merger enforcement are essential.<sup>104</sup> The great irony in all of this is that the greater acceptance of extraterritorial jurisdiction theories has created a need for international agreements: precisely

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<sup>102</sup> See 1991 *Special Committee Report* at ch 7 (cited in note 36); James T. Halverson, *Harmonization and Coordination of International Merger Procedures*, 60 *Antitrust L J* 531 (1991).

<sup>103</sup> The Merger Regulation, Council Reg 4064/89, 1990 OJ L257:14, establishes several thresholds for the necessary "Community dimension." These require that the firms involved have a combined aggregate worldwide turnover of more than 5 billion ECU (approximately U.S. \$6.2 billion) and that the aggregate Community-wide turnover of each of at least two of the firms involved is more than 250 million ECU (approximately U.S. \$300 million), unless in the latter case each of the firms involved achieves more than two-thirds of its aggregate Community turnover in one and the same Member State. See *id.*, art 1(2), 1990 OJ at L257:16. There are various exceptions to these general rules, including the so-called German clause of article 9, which allows the Commission to refer a Community-dimension merger to a Member State in which a distinct market is particularly affected; the exception for legitimate national interests such as public security, plurality of the media, and prudential rules noted in article 21(3); and the exception of article 22(3), allowing a Member State to refer a concentration falling below the Community thresholds to the Commission for appropriate action.

<sup>104</sup> Examples of such overlaps are multiplying daily. They include *Consolidated Gold Fields PLC v Minorco, S.A.*, 871 F2d 252 (2d Cir 1983), cert dismissed, 110 S Ct 29 (1989) (reviewed by the U.S., the United Kingdom, Australia, and the EC); the Cillette/Wilkinson acquisition, reviewed from Europe to North American to Australia; and the acquisition by Sara Lee Corp. of Playtex Apparel, Inc., reviewed by the United States, Italy, and Canada. The problem of coordination with private litigation in the United States is a serious one, particularly after the decision in *California v American Stores Co.*, 110 S Ct 1853 (1990), established the rule that private parties in the U.S. and state attorneys general are entitled to obtain divestiture or other forms of injunctive relief against mergers.

the mechanism that the greatest opponents of extraterritoriality urged was the only legitimate one for handling transnational problems.<sup>105</sup>

### III. BARRIERS TO AGREEMENT; COSTS OF INACTION

Unilateral action has proven incapable of providing a satisfactory regulatory regime for international competition problems, and it is clear that the degree of economic (and now political) unification that the EC countries have chosen internally is not the way the EC, the U.S., and Canada together will solve their coordination problems.<sup>106</sup> The questions at hand are whether the barriers to effective international agreements—short of EC-style integration—are simply too great for resolution, and what will be the likely price of lack of agreement.

#### A. Substantive Barriers to International Agreement

Substantive disagreements in the letter of the law among the EC, the United States, and Canada, continue to impede greater international cooperation, but it would be a mistake to assume that they form an insurmountable barrier. In the grand scheme of things, whether from an historical, comparative, or philosophical viewpoint, the similarities are far more striking.<sup>107</sup> More than that,

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<sup>105</sup> Douglas E. Rosenthal and William M. Knighton, *National Laws and International Commerce* 40, 90-91 (Routledge & Kegan Paul, 1982).

<sup>106</sup> The balance of the article confines the discussion of harmonization or agreement possibilities among the U.S., EC, and Canada.

<sup>107</sup> So much has been written about all three bodies of law that it would be difficult to do each one justice. Hawk, *United States, Common Market and International Antitrust: A Comparative Guide* (cited in note 85), both describes EC law in detail and offers useful comparisons to U.S. law throughout. See also Goyder, *EC Competition Law* (cited in note 21); Ritter, Rawlinson, & Braun, *Practitioner's Guide* (cited in note 21), on EC competition law.

A description of the Competition Act of 1986 (Canada) can be found in von Kalinowski, *A3 World Law of Competition* (rel 36-5/87) (cited in note 3). See also Calvin S. Goldman, *The New Merger Provisions of the Competition Act of Canada*, in Barry E. Hawk, ed, *North American and Common Market Antitrust and Trade Laws: Annual Proceedings of the Fordham Corporate Law Institute* 119 (Matthew Bender, 1988); J. William Rowley, *The New Canada Antitrust Laws: Reflections from the Private Sector*, in Hawk, ed, *North American and Common Market Antitrust and Trade Laws: Annual Proceedings of the Fordham Corporate Law Institute* at 157; Ivan R. Feltham, *The New Canadian Antitrust Law*, in Hawk, ed, *North American and Common Market Antitrust and Trade Laws: Annual Proceedings of the Fordham Corporate Law Institute* at 225. With respect to U.S. law, a convenient one-volume treatment of the area is Herbert Hovenkamp, *Economics and Federal Antitrust Law* (West Publishing, 1985). The leading treatise is Phillip Areeda and Donald F. Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (Little, Brown & Co, 1978).

the priorities or ranking of competition issues, from most important to least, looks much the same across the three jurisdictions: cartels of all kinds top the list; the need to regulate mergers from a competitive standpoint is a close second (and is related in any event to the cartel issue); and abuses of dominant firm behavior comes next (the higher the firm's market power, the higher the level of consensus). The differences include disagreements about the proper treatment of unfair or anticompetitive behavior that does not immediately affect price or output levels, the appropriate regime for vertical restrictions, and the way in which competition policy relates to broader national economic goals.

1. *Purposes of competition law.*

To a small (and perhaps shrinking) degree, the three bodies of law differ with respect to the purposes they acknowledge. In the United States, the purposes of antitrust law are still a subject of debate, since the governing legislation is limited to statements of general principle, and the purpose at this point must be discerned from the accumulated case law.<sup>108</sup> In Canada, the purposes are explicitly set forth in Section 1 of the Competition Act; they include the promotion of efficiency, protection of small and medium-sized businesses, and consumer welfare.<sup>109</sup> In the EC, the original reason for the inclusion of competition policy may well have been the need to prevent private restraints that had the effect of dividing national markets from replacing public tariffs and quotas.<sup>110</sup> At this point, however, the Community relies just as much on the general benefits of a competitive market for consumer welfare, business efficiency, and fair access to the market.<sup>111</sup>

In general, the purposes of a competition law may include some or all of the following: allocative efficiency, fair business practices, eliminating exclusionary practices, avoidance of private barriers to trade across a geographical region, access to the market, and enhancing *domestic* welfare. The factor that separates the

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<sup>108</sup> Compare Eleanor M. Fox and Laurence A. Sullivan, *Cases and Materials on Antitrust* 2-3, 10-11, 845-51 (West Publishing, 1989); Robert Pitofsky, *The Political Content of Antitrust*, 127 U Pa L Rev 1051 (1979); with Richard A. Posner, *Antitrust Law: An Economic Perspective* 3-4, 8-35 (U of Chicago Press, 1976); Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 7-8, 50-89 (Basic Books, 1978); Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex L Rev 1 (1984).

<sup>109</sup> See Competition Act R S, c C-23, s 1.1; 1986, c 26, s 19.

<sup>110</sup> See note 21.

<sup>111</sup> See *Twelfth Report on Competition Policy*, cited in Ritter, Rawlinson, & Braun, *Practitioner's Guide* (cited in note 21).

competition purists from the others is the question whether competition is a national goal for its own sake, or, on the other hand, whether it is simply a part of a more general industrial policy regime. Should competition yield, for example, when a merger that clearly will raise prices for consumers will also save jobs in a particular region? Should it yield when an export cartel that obviously harms worldwide consumer welfare holds some promise of improving trade balances? Even if one assumes that the answer to those questions in the United States favors competition in all instances (which is far from clear),<sup>112</sup> the debate is even more immediate in Europe and Canada.<sup>113</sup>

## 2. *What is actually anticompetitive?*

Some states have a very narrow definition of a "restraint of trade" or an "anticompetitive practice," including only practices that would create economic market power or, in other words, enable a firm to influence price by restricting output under circumstances where the positive benefits would not outweigh the welfare losses.<sup>114</sup> A somewhat broader definition would condemn all arrangements or practices that enhanced or supported market power, whether or not any efficiencies were created at the same time. Many, however, consider antitrust or competition law to be a body of law that assures equal access to the market for competitors and that, therefore, condemns anticompetitive behavior such as predatory pricing, refusals to deal, refusal to permit access to an essential facility, and any other practice that may penalize a firm that is just as efficient as the predator. The scope of antitrust policy is, finally, a political decision, and no country actually practices the purest version. If one jurisdiction bans something and another thinks it represents good hard competition, agreement will be difficult.

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<sup>112</sup> See, for example, recent calls for a national industrial policy, such as that of Rep. Norman Mineta. *Government Should Aid High-Tech Industry*, Rep. Mineta States, Intl Trade Daily (BNA) (May 7, 1992); see also Reich, *The Next American Frontier* (cited in note 4), and Robert B. Reich, *The Work of Nations* (A.A. Knopf, 1991).

<sup>113</sup> See Canadian Competition Act 1986, Art 32(4), which exempts export associations from the cartel offense. Note also that clause 13 of the preamble to the EC's Merger Regulation calls on the Commission to implement the Regulation "within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty, including that of strengthening the Community's economic and social cohesion, referred to in Article 130a." Council Reg 4064/89, 1990 OJ L257:14.

<sup>114</sup> This concept of economic efficiency requires the antitrust enforcer not only to detect market power, but also to offset any resource efficiency gains that the firm with market power may be able to effect.

## B. Procedural Barriers

Procedural variations are more significant for two reasons: first, the differences among regions are far more notable; and second, the procedural differences translate into different enforcement patterns. A country's commitment to a particular law is, in the end, only as good as the procedural mechanisms available to enforce that law—this is, after all, the place where a country puts its money where its mouth is.<sup>115</sup> In the final analysis, procedural differences reveal actual substantive preferences, since compliance is more likely a function of credible enforcement than of words in a statute or treaty.

1. *Enforcement mechanisms.*

On the U.S. side, there are numerous enforcers, including the Department of Justice, the Federal Trade Commission, the state attorneys general, and private parties, which effectively leaves policy-making up to the courts, with an occasional intervention from Congress.<sup>116</sup> In the courts, procedures such as the liberality of the notice pleading system,<sup>117</sup> pre-trial discovery,<sup>118</sup> occasionally class actions,<sup>119</sup> and the broad injunctive power enjoyed by federal judges, are strange and offensive to outsiders. On top of that, the separation of powers doctrine in the United States that insulates the federal judiciary makes antitrust policy far more difficult to change in a political sense than one finds on the European or Canadian side. In Europe, for example, the Commission's central role creates an entirely different political dynamic.<sup>120</sup> Whether govern-

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<sup>115</sup> In this connection, one might recall the dismal human rights record of the former Soviet Union, in spite of the existence in the Brezhnev Constitution of 1977 of an impressive-looking list of individual rights. More modestly, the same point holds for antitrust law.

<sup>116</sup> See generally Areeda & Turner, 2 *Antitrust Law* ¶¶ 308-13, 331-32, 343 (cited in note 107).

<sup>117</sup> See FRCP 8. Note here that most antitrust enforcement continues to take place in the federal courts, where these rules prevail, even though many states have their own local antitrust laws. In the latter cases, one should note that most states have some version of notice pleading also, even those that nominally still consider themselves to be code states, such as California, Illinois, and New York.

<sup>118</sup> See FRCP 26-37.

<sup>119</sup> See FRCP 23. The existence of the rule of *Illinois Brick Co. v. Illinois*, 431 US 720 (1977), which bars most suits by indirect purchasers, has contributed to a decline in the number of consumer class actions. See, for example, Stephen D. Susman and John B. McArthur, *If It Ain't Broke, Don't Fix It*, 55 *Antitrust L J* 59, 62-63. See also the Georgetown Law Center, *Conference on Private Antitrust Litigation*, 74 *Georgetown L J* (1986), which reported on a comprehensive study of private antitrust enforcement.

<sup>120</sup> See Francis G. Jacobs, *Europe After 1992: The Legal Challenge*, 1992 *U Chi Legal F* 1, 4-7.

ment monopoly over policy and enforcement is a good thing or a bad thing is certainly debatable. The fact that these responsibilities differ, however, causes distrust on both sides, which in turn compromises genuine antitrust harmonization.

## 2. Remedies.

The remedial structures in the different jurisdictions also differ significantly. The same offense that actually may cause criminal prosecution in the United States poses somewhat less risk of the same in Canada, and no risk at all in the EC.<sup>121</sup> The government may not seek civil penalties in the United States, but the Commission may do so in Europe.<sup>122</sup> On the other hand, only the United States permits private treble damage actions, private requests for injunctions, and private access to the divestiture remedy in merger cases.<sup>123</sup> Due to these procedural differences, both the risk of being accused of an anticompetitive practice and the expected penalty will differ substantially, and, hence, so too will the importance of competition law as a primary rule regulating industry behavior.

## 3. Antitrust and fundamental economic policy.

In the final analysis, the reason individual nations have thus far insisted on autonomy over their competition law policy rests in the complex interrelationship between competition law and other national economic goals, such as technological development, full employment, respect for the sovereignty of inferior political units (that is, the states in the U.S., the provinces in Canada, the Member States of the EC), and international trade balances. If a country has autonomy over its competition policy, it has de facto power to make exceptions to even the strictest rule. International accountability, or subordination to an international body, would compromise that ability. No society is unequivocally committed to

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<sup>121</sup> Sections 1 and 2 of the Sherman Act, 15 USC §§ 1, 2, make collusive anticompetitive behavior ("contracts, combinations, and conspiracies in restraint of trade") and monopolization felonies. The government vigorously prosecutes hard-core price-fixing and bid-rigging under these statutes. See Areeda & Turner, 2 *Antitrust Law* at ¶ 309 (cited in note 107). Although the 1986 Canadian Competition Act retains criminal provisions for certain offenses (see Part V, §§ 32-39), it is fair to say that the emphasis in Canadian enforcement shifted from the criminal sphere (under which little activity had taken place) to the civil sphere. In the EC, of course, Articles 85 and 86, as well as the Merger Regulation, are purely administrative.

<sup>122</sup> See Council Reg 17/62, arts 15, 16, 1962 OJ 204, as amended by Council Reg 59/62, 1962 OJ 1655, Council Reg 118/63, 1963 OJ 2696, and Council Reg 2822, 1971 OJ L285:49; and the Merger Regulation, Council Reg 4064/89, arts 14, 15, 1990 OJ at L257:22-23.

<sup>123</sup> See sources cited in note 107.



antitrust policy, and the power to choose when an exemption will or will not exist is the essence of economic sovereignty. Once again, the Uruguay Round of GATT negotiations provides the best comparison. The same basic problems of economic sovereignty are stalling these negotiations on issues such as agricultural subsidies, protection of industry, and intellectual property protection. Few countries would be willing to cede these basic decisions to a superior organization, without some assurance that their interests would be fully respected.

### C. What Is the Cost of Failure?

Having noted the important obstacles to international agreement, the fact remains that some kind of agreement would be helpful and that the costs of failing to agree will be high now, and higher over time. Those costs fall into three general categories.

#### 1. *Transaction costs.*

To the extent that firms conduct business in several jurisdictions (a circumstance that is common now, and likely to increase), the existence of conflicting rules gives rise to substantial transaction costs. On a day-to-day basis, firms must monitor multiple rules and devise structures to comply with all of them, even when serious inconsistencies exist. In the case of mergers, companies must deal with multiple pre-merger clearance procedures simultaneously, filling out differing forms, adhering to different timetables, and adjusting to the different nuances of substantive review.

Occasionally, firms may find themselves in the unenviable position addressed by the foreign sovereign compulsion defense: commanded by one country to take a certain action, forbidden by another to do the same thing. Withdrawal from one of the markets is not likely to be an efficient solution for either the firm or the consumers involved. Yet the broad acceptance of the effects theory of jurisdiction means that there is no simple solution such as the device of giving jurisdictional primacy to only one of the countries. To the extent that slight differences in law and procedure produce substantial private dislocations, the transaction costs may be out of proportion to the gain either side expects.

### 2. *Global inefficiency costs.*

To the extent that there is a "correct" rule for competition policy—such as the anti-cartel rule<sup>124</sup>—the existence of exceptions to this rule will cause the classic social deadweight losses that each country is individually committed to eliminating. Even if one nation is temporarily better off because it has found a way to extract monopoly rents from its neighbors, globally this is an impoverishing solution.

### 3. *Trade distortions.*

What happens when one country allows cartels and another does not? The U.S. courts faced this issue in the Japanese electronic products litigation, where the U.S. industry claimed that the high cartel profits from the protected Japanese market were being used to subsidize a broad-based attack on the U.S. industry.<sup>125</sup> Without engaging in the unlikely assumption that the Japanese were voluntarily losing money in the U.S. for a period of twenty years, one might think that the trade patterns that would have prevailed in the absence of a hypothesized Japanese cartel would have been different than those that were actually observed and that greater competition might have allowed some efficient U.S. firms to survive.<sup>126</sup> Although individual countries might see some advantage in such conduct, over the long run, everyone is better off without this kind of trade distortion.

## IV. THE NEXT PHASE

Bluntly speaking, the question for the future is whether the developed countries can afford to leave competition law in its present condition—unilaterally determined and enforced, with the occasional bilateral treaty formalizing interactions between enforcement agencies—or whether something more is desirable, if not

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<sup>124</sup> Nearly every state or organization with a competition law at all subscribes to the anti-cartel rule. See 1991 Special Committee Report at ch 2 (cited in note 36).

<sup>125</sup> See *Matsushita Electric Industrial Co. v Zenith Radio Corp.*, 475 US 574 (1986).

<sup>126</sup> Note that this is a different point from the question whether U.S. consumers were hurt over the short run by the Japanese firms' practices. If the Japanese firms were exploiting Japanese consumers, or the Japanese taxpayer, in order to charge lower prices in the United States, then U.S. consumers suffered no immediate injury—they bought bargain T.V. sets. However, a strict economic approach disapproves of resource misallocations brought about by artificially low prices (that is, too many resources devoted to buying this product) just as it disapproves of misallocations brought about by artificially high prices (that is, too few units of the product demanded). "Artificial" in this context means a result brought about by market power on either the buying or selling side, as opposed to transactions driven solely by market constraints.

essential. Specifically, will agreements like the U.S.-EC bilateral be enough, or should it be regarded as the first step toward something more ambitious? In spite of the existing differences in viewpoint and the difficulties of overcoming them, the answer seems plain. Over the long run, the costs of the "no international antitrust" solution (at least among the major economic players) will become prohibitively high. Although nothing like the European solution will be achievable on a broader multilateral scale any time soon, serious cooperation, convergence, and ultimately harmonization are possible if efforts are carefully targeted both to the needs of the international system and to the obstacles identified here. Such a regime would move international antitrust as far forward as it needs to go at the present time, while respecting the inappropriateness of more ambitious steps in the light of existing political institutions.

#### A. Accuracy of Decisionmaking

The first set of concerns one can discern from the remaining differences among countries relate to the accuracy of decisionmaking: has the court, or the commission, or the agency, accurately identified a practice that is anticompetitive? Accuracy concerns are amenable to procedural solutions. In particular, enforcement agencies (following the direction of the U.S.-EC Agreement) could improve their information-sharing abilities, seek necessary amendments to national confidentiality rules permitting counterpart agencies to be treated the same as the home agency, and create access to court and administrative proceedings for counterpart agencies equivalent to the access rights given other favored parties (such as the Member States within the EC, or the U.S. Attorney General in the United States).

The existence of private suits in the United States would continue to be problematic since only the courts control the final outcome in actual litigation, and since the private attorney-general is here to stay. On the other hand, if a limited restriction of the private suit were presented as the *quid pro quo* for the elimination of troublesome jurisdictional conflicts for U.S. firms overseas, an agreement addressing the issue of private litigation might not be impossible. For example, in keeping with present trends, one can imagine restricting damages for notified joint ventures and mergers to single damages, providing for loser-pays attorneys fees, and restricting private access to injunctions to circumstances that were not before the FTC or the Department of Justice in the Hart-Scott-Rodino filings. Such measures would add predictability to

U.S. enforcement, while at the same time preserving private suits for core antitrust violations and for egregious circumstances. Finally, more detailed choice of law rules, pursuant to which one agency would be assigned the lead role, can contribute to both accuracy and efficiency. Such rules could assure primacy for the country or region with the greatest interest in the transaction and, hence, the greatest expertise in the application of the proper rules.

#### B. Penalty Levels

Penalty levels, as noted above, also vary from place to place and, thus, pose an impediment to agreement. These concerns are not easily overcome, since the level of penalty is directly related to the broader social decision about the role of competition law in national economic policy. To the extent that a country has adopted criminal penalties to achieve optimal deterrence, however, it could recognize the appropriate level of fines as achieving the same goal. In the penalty area, as in others, an agreement may be possible once the ultimate reason for the chosen penalty is articulated clearly. Mutual recognition might work within certain thresholds and for certain areas, such as mergers, joint ventures, and cartels. Other areas (abuse offenses, in particular) might require more formal harmonization, which would need to be accomplished through national laws.

#### C. Prosecutorial Discretion

The third general issue relates to another hallmark of sovereignty, prosecutorial discretion. The choice of cases to prosecute, as well as the choice of persons empowered to make this decision, is simply an indirect substantive decision. To the extent that effective political oversight of the prosecutors exists, enforcement decisions can create *de facto* exemptions to the competition laws, as well as relatively safe (or risky) areas. Any effective international agreement would diminish this kind of discretion. If information-sharing were sought in the case of a nominally illegal agreement that suited political industrial policy goals, facilitating the other country's enforcement efforts would compromise those goals. It would become more difficult to wink at agreements that may cause harm only to foreign consumers, such as rent-seeking export arrangements that exploit the other signatory or signatories.

In the final analysis, this may be another area where the best should not be the enemy of the good. Rather than attempt to prevent nations from exercising these kinds of judgments altogether,

it may be preferable to permit national interest exceptions under closely monitored circumstances. Something like the escape clause of Article XIX of the GATT may offer a useful model. When some kind of threshold national interest is proven, a country could invoke the escape mechanism and avoid its international enforcement obligations. The mechanism could be limited by time, by region of the country, or by other statutory mandates, such as restrictions related to the international trade laws. In a world of first-best, nothing like this would be desirable, but in the real world, there must be some way to respond to the economic sovereignty-based need to create exceptions while at the same time permitting international antitrust rules to operate for the vast majority of cases.

#### D. Institutional Support

Last, an effective agreement must have credible institutional support. The machinery for dispute resolution, for advisory opinions, and for monitoring compliance, will play a critical role in the success of the arrangement. To take a counterexample, it is notable that the reason why the ECJ rejected the first draft of the agreement for the European Economic Area was largely because of institutional concerns about the hybrid court that the EEA would have created.<sup>127</sup> The machinery created by the U.S.-Canada Free Trade Agreement under Articles 18 and 19 provides an intriguing precedent for this problem: dispute resolution that is institutionalized in the agreement, with the agreement itself as a partial source of law, but which ultimately relies on the national laws of the signatory parties.<sup>128</sup> An agreement with machinery that draws on these alternative models could furnish a more ambitious degree of coordination than the present bilaterals and would be more responsive to the needs of international business and the shrinking world in the twenty-first century, while, at the same time, it would not require

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<sup>127</sup> See *Court rules against EEA treaty*, Common Mkt Rptr (CCH) ¶ 96,198. The final solution, which was approved by the ECJ on April 11, 1992, makes it clear that the ECJ is the dominant legal body. The treaty now creates a political committee to handle disputes arising from the treaty, making the ECJ supreme in all antitrust matters involving either the EC or both the EC and EFTA areas, and creating an EFTA Court for purely EFTA problems. See *EC Court of Justice Rules in Favor of European Economic Area*, Intl Trade Daily (BNA) (Apr 14, 1992).

<sup>128</sup> See Conference, *Canada-United States Free Trade Agreement*, 17 Can-US L J (cited in note 74), on the law and economics of dispute resolution between Canada and the United States. See in particular Jean Anderson and Jonathan T. Fried, *The Canada-U.S. Free Trade Agreement in Operation*, 17 Can-US L J 397 (1991).

closer economic integration than the political will in all countries concerned would support.

#### CONCLUSION

Despite the failures of the immediate post-World War II policymakers to craft a successful international antitrust policy, their basic instincts were correct. The benefits of international trade and the global prosperity that all nations seek will be stymied without a broad international commitment to the ground rules for competition. It is probably best not to impose this task on the already overworked GATT, given the disparities in development, economic system, and experience with competition law that exist across the GATT's broad membership.<sup>129</sup> A modest beginning, such as a trilateral agreement among Canada, the European Community, and the United States, would have the benefits of building on a sophisticated competition law tradition in each country, relying on a reciprocal enforcement system rather than unknown international machinery, and allowing experimentation with a framework that ultimately could expand to include all nations willing to trust the market. International antitrust, in the end, will only be as impossible as national protectionist forces make it.

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<sup>129</sup> I do not necessarily disagree with Sir Leon's suggestion that the GATT or a similar organization might not ultimately be a good place for this function. See Speech of Sir Leon Brittan (cited in note 21); Speech to World Economic Forum (Feb 3, 1992), reported in Common Mkt Rptr # 700, at 11-12 (Feb 20, 1992). However, it seems better to try walking before we begin sprinting or running in this area.

